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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; UNITED MINE WORKERS OF AMERICA, LOCAL UNION NO. 1525, *Petitioners,*

v.

A.T. MASSEY COAL COMPANY, INC.; RAWL SALES AND PROCESSING COMPANY/BLACKBERRY CREEK COAL COMPANY; SPROUSE CREEK PROCESSING COMPANY; TALL TIMBER COAL COMPANY; PIKCO MINING COMPANY; ROCKY HOLLOW COAL COMPANY; BLUE SPRINGS COAL COMPANY; ALLBURN COAL COMPANY, INC.; POND CREEK MINING COMPANY; P.M. CHARLES COAL COMPANY; WYOMAC COAL COMPANY, INC.; WINSTON COAL COMPANY; ROBINSON-PHILLIPS COAL COMPANY; M. & B. COAL COMPANY; SIMRON FUEL INC.; SHANNON-POCAHONTAS COAL COMPANY; ROYALTY SMOKELESS COAL COMPANY/TRACE FORK COAL COMPANY; BIG BEAR MINING COMPANY; PIKE COUNTY COAL CORPORATION; JOBONER COAL COMPANY; TCH COAL COMPANY; BIG BOTTOM COAL COMPANY, INC.; OMAR MINING COMPANY; and DEHUE COAL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly determine that a corporation not signatory to a collective bargaining agreement, but so closely-tied to a signatory as to constitute a single employer, cannot be compelled to arbitrate disputes thereunder unless it "authorized" the signatory to bind it to an arbitration duty? (As explained herein, the decision below conflicts with several other federal courts of appeals which have held that where nominally-separate corporations are so closely-tied as to constitute a single entity, an obligation to arbitrate assumed by one component of the single entity is binding on the other irrespective of authorization.)

2. Did the Court of Appeals err in itself making the determination that A.T. Massey and its various nonsignatory subsidiaries owed no duty to arbitrate disputes arising under the National Bituminous Coal Wage Agreement of 1984 rather than remanding the case to the District Court where (a) the Court of Appeals *sua sponte* substituted a novel legal standard not raised by any party for the test applied by the District Court in compelling arbitration by the nonsignatory entities, (b) the matter was presented on appeal from a preliminary injunction, (c) no party had requested entry of summary judgment, and (d) the union had no opportunity for discovery addressing the newly-adopted standard?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, the United Mine Workers of America (hereafter "UMWA"), District 17, United Mine Workers of America, and Local Union 1525, United Mine Workers of America respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit entered September 3, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 799 F.2d 142. The opinion and judgment are appended at 1a to 12a. The Court of Appeals' Order denying rehearing is appended at 13a.

The Order Granting Preliminary Injunction, Memorandum Opinion on Preliminary Injunction and Order Modifying Order Granting Preliminary Injunction of the United States District Court for the District of West Virginia are appended at 14a to 25a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the United States Court of Appeals for the Fourth Circuit was entered on September 3, 1986. A timely petition for rehearing *en banc* was denied on December 3, 1986.

STATUTES INVOLVED

This case involves § 301 of the Labor-Management Relations Act, as amended, 61 Stat. 156, 29 U.S.C. § 185. The provision is appended at 26a.

STATEMENT OF THE CASE

A. Background.

The UMWA is a labor organization which has for many years represented coal miners throughout the United States in collective bargaining with their em-

ployers. Bargaining between the UMWA and the Bituminous Coal Operators Association ("BCOA") has since the 1940's produced a series of multiemployer collective bargaining agreements the most recent of which is the National Bituminous Coal Wage Agreement ("NBCWA") of 1984. A recurrent barrier to the UMWA's bargaining efforts has been the practice of some mining enterprises of creating multiple corporations, each purporting to be a separate and distinct employer at the respective mines where the UMWA has established itself as the employees' bargaining representative and each insisting upon bargaining separately with the UMWA. The UMWA has, in response to this problem, negotiated with the BCOA a provision making the NBCWA applicable to all unionized operations of each signatory employer and also to the operations of "any subsidiary or affiliate . . ." of that signatory employer whose employees have designated the UMWA as their bargaining agent.[1]

A.T. Massey is the parent company of some 73 subsidiary corporations engaged in the business of producing, purchasing and selling coal (17a). Together the Massey companies comprise one of the largest producers of coal in the United States. Massey's unionized subsidiaries were signatory to the 1981 NBCWA, some (including Omar Mining Co.) through membership in BCOA —the multiemployer bargaining representative—and some

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[1] Article IA(f) of the 1984 NBCWA provides:

> As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any *subsidiary or affiliate* at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. This section will immediately apply to any new operations upon the Union's recognition, certification, or otherwise properly obtaining bargaining rights.

(Emphasis added).

via separate, independent execution of the 1981 multi-employer agreement. Since the inception of the 1984 NBCWA, only Omar among the Massey defendant subsidiaries has remained a BCOA member. Omar thus is signatory to the 1984 NBCWA including the provision in Article IA(f) that the agreement is applicable to any subsidiary and affiliated corporation. Massey and its other UMWA-represented subsidiaries, claiming to be separate employers from Omar, have refused to acknowledge any obligation to the 1984 NBCWA notwithstanding Article IA(f).(5a).[2]

B. Procedural History.

This litigation arises from a grievance filed by employees of the Omar Mining Co. asserting that the 1984 NBCWA, by virtue of Article IA(f), applies not only to the Omar mine but also to the unionized mines of Massey's other subsidiaries. When Massey and its nonsignatory subsidiaries refused to arbitrate, the union sued to compel arbitration. As a basis for the nonsignatory entities' duty to arbitrate, the union alleged that the Massey companies, including Omar, operate under "centralized control" of A.T. Massey; that Massey's control is exercised "without reference to corporate forms"; and that "[s]uch machinations and corporate manipulation are intended to insulate A.T. Massey from adverse consequences that may flow from the exercise of central power." (Complaint ¶ 6, A.9).[3] The union accordingly sought to require Massey and its other unionized subsidiaries to participate along with Omar in an arbitration over the meaning of Article IA(f)—an arbitration in

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[2] This case involves *only* Massey's unionized subsidiaries. While Massey also has a substantial number of nonunionized subsidiaries, they are not parties to this suit and there is no contention by the UMWA that NBCWA Article IA(f) applies to them in any way.

[3] Referenced pleadings are contained in the Joint Appendix filed in the Court of Appeals and referred to here as "A. ——".

which the arbitrator would decide whether the other entities constitute a "subsidiary or affiliate" of Omar and thus whether their unionized mines are covered by the agreement pursuant to Article IA(f).

The District Court granted a preliminary injunction compelling arbitration by Omar and also by Massey and its other unionized subsidiaries. The District Court determined the distinction in corporate identities as between Omar and the Massey nonsignatories to be sham. (19a-20a). Applying a test originally developed by the NLRB in unfair labor practice proceedings but since applied by several courts of appeals in § 301 litigation, the District Court found that Massey and the other Massey subsidiaries, along with Omar, constitute a "single employer" and were accordingly required to arbitrate. (23a).[4]

The Court of Appeals reversed the preliminary injunction. It did not dispute the District Court's finding that Massey and its subsidiaries are a single employer. The panel majority itself characterized the Massey companies as "a single production entity with sales, transportation and distribution coordinated from Massey's Richmond headquarters . . . ." (3a). The panel majority declared, however, that a different legal standard applied—"whether Omar was empowered to act as an agent authorized to bind its parent and affiliates to an agreement to arbitrate" (9a)—rather than a test that disregards distinctions of corporate identity which are artificial. Though saying it espoused "ordinary agency principles" (9a), the panel without discussion precluded potential application of corporate veil piercing—itself an aspect

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[4] By order of May 2, 1986, the Court of Appeals stayed the District Court's order insofar as it ordered Massey and its subsidiaries, apart from Omar, to arbitrate.

of agency law—which disregards the corporate entity in circumstances of the precise sort alleged in the union's complaint.

Having prescribed a different legal standard than that applied by the District Court, the panel majority (Judge Hall dissenting) proceeded finally to resolve, at the appellate level, whether the Massey nonsignatories could be required to arbitrate. The panel majority recited it had independently "reviewed the record" and "our review of the record satisfies us" that there was no evidence that Omar was "*authorized* to bind its parent and affiliates to an agreement to arbitrate." (9a) (emphasis added).[5] Judge Hall in dissent would have remanded the matter to the District Court for proceedings in light of the panel's newly-adopted standard.[6]

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[5] In a separate ruling which we do not challenge in this Petition, the panel (Judge Hall concurring in this respect) set aside the preliminary injunction. That decision was predicated not merely upon the panel's substitution of a different legal test for binding nonsignatories but also upon its conclusion that, whatever legal standard applied, the District Court had failed to determine whether the Massey companies were bound by an agreement to arbitrate and instead had left the question of arbitrability to be resolved by the arbitrator contrary to *AT&T Technologies, Inc. v. Communications Workers*, —— U.S. ——, 106 S.Ct. 1415 (1986). In this regard, the panel failed to perceive that the single employer determination, at least under decisions of *other* courts of appeals followed by the District Court in this case, fully constituted a judicial determination of the Massey companies' duty to arbitrate.

[6] The panel found it unnecessary to remand the issue for development of a factual record in the District Court notwithstanding that (1) the sole record was based on a preliminary injunction hearing; (2) such record as existed had been developed on the parties' mutual belief that the single employer standard, rather than the panel's newly-announced test, applied; (3) the plaintiff had not yet had discovery; and (4) the defendants had never moved for summary judgment and plaintiff had no notice or opportunity to make a response.

REASONS FOR GRANTING THE WRIT

ON AN ISSUE OF GREAT AND RECURRING IMPORTANCE, THE FOURTH CIRCUIT HAS HELD, CONTRARY TO SIX OTHER COURTS OF APPEALS, THAT EVEN IF NOMINALLY-SEPARATE EMPLOYERS ARE SO CLOSELY TIED AS TO CONSTITUTE A SINGLE ENTITY, THE OBLIGATIONS ASSUMED BY ONE PART OF THAT SINGLE ENTITY ARE NOT BINDING ON THE OTHER PARTS UNLESS THOSE OTHER PARTS HAVE EXPRESSLY AUTHORIZED THE CONTRACTING PARTY TO BIND THEM.

Labor agreements, in conformity with national labor policy, typically provide for resolution of contract disputes through arbitration. This case is one among a growing number in which the effective enforcement of an arbitration pledge requires recourse not only against the signatory employer but also against an employer so closely tied to the signatory that both are properly considered a single entity. The court below, as we show in points 1&2 below, adopted a test for resolving such cases which is in conflict with the test used by the six other courts of appeals which have considered the same issue. This conflict in the circuits as we show in point 3 undermines the uniform labor policy favoring arbitration that §§ 203(d) and 301 of the Labor-Management Relations Act of 1947 were enacted to advance and that this Court has been astute to preserve. The Court below adopted a test for resolving when a nonsignatory is required to arbitrate which is in conflict with all other courts of appeals.

1. While courts ordinarily treat a corporation, its shareholders, and affiliated corporations as distinct entities, they have recognized that under certain circumstances the corporate form should be disregarded and all components of the single entity should be bound by the obligations entered into by only one component.[7] In

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[7] Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law,* 95 Harv. L.Rev. 853 (1982). The

Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd., 417 U.S. 249, 259, n.5 (1974), for example, the Court while holding that an arms length purchaser of a business is not required to arbitrate under the seller's collective bargaining agreement, observed that "courts have had little difficulty holding . . . the successor . . . subject to all the legal and contractual obligations of the predecessor" where the purchaser is the "alter ego" of the seller. See n.9, *infra*. Since *Howard Johnson*, several courts of appeals have passed on the question of a nonsignatory's duty to arbitrate a grievance arising under a collective bargaining agreement both within and without the successorship context. See 10-13, *infra*. In this case, the Fourth Circuit has adopted a test which conflicts with the standard applied by all other courts of appeals.

2. The court below held that arbitration can be compelled only when the nonsignatory has expressely *authorized* a signatory to bind the nonsignatory to an arbitration duty. In doing so, that court dismissed as irrelevant the objective realities of the relation between the two entities—realities which the district court found established that the entities are a single employer.

Other courts of appeals, determining the nonsignatory's duty to arbitrate with a view to the national labor policy favoring effective enforcement of labor agreements, have drawn variously on the NLRB single employer [8] and

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issue arises in a broad diversity of federal question litigation including labor-management relations, employment discrimination, income tax law, bankruptcy, patent law, medicare regulation, social security, truth in lending law, and admiralty. *Id.* at 860-861.

[8] Under the single employer doctrine, the NLRB treats two or more related enterprises as one employer within the meaning of § 2(2) of the NLRA, 29 U.S.C. § 152(2) for purposes of considering the existence of an unfair labor practice, *e.g.*, an unlawful refusal to bargain, or for determining satisfaction of the Board's jurisdictional minimum. *Radio & Television Broadcast Technicians Local*

alter ego doctrines[9] and also on general principles of corporate veil piercing.[10] Those courts have required the nonsignatory to arbitrate when the objective realities of the intercorporate relation establish that two nominally-separate employers are in reality a single entity, regardless of whether one part of the single entity has authorized the other to bind the first.

Union 1264 v. Broadcast Service of Mobile, Inc. (Radio Union), 380 U.S. 255, 256 (1965); *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers,* 425 U.S. 800, 802, n.3 (1976). The factors used by the Board to determine single employer status are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *Radio Union, supra,* 380 U.S. at 256.

[9] Under the alter ego doctrine, the NLRB has prevented employers from evading their obligations under the LMRA by setting up what appears to be a new company but is in reality a "disguised continuance" of the old one. *Southport Petroleum Co. v. NLRB,* 315 U.S. 100, 106 (1942). While the Board often looks to factors similar to those involved in a single employer question, the focus of the alter ego inquiry is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations. *Amalgamated Meat Cutters v. NLRB,* 663 F.2d 223, 227 (D.C. Cir. 1980); *NLRB v. Ozark Hardwood Co.,* 282 F.2d 1, 5-7 (8th Cir. 1960).

[10] Piercing the corporate veil is a doctrine which originated in state corporate law. It abrogates separate corporate identity and, in order to achieve an equitable result, treats a corporation as the agent, instrumentality, or alter ego of a natural person or other corporate entity. Under one commonly accepted formulation, the doctrine requires (1) "such unity of interest and ownership that the separate personalities . . . no longer exist" and (2) "that if the acts are treated as those of the corporation alone, an inequitable result will follow." *Automotriz Del Golfo de Cal. S.A. v. Resnick,* 47 Cal. 2d 792, 796, 306 P.2d 1, 3 (1957). Different states, however, apply somewhat divergent standards. 1 W. Fletcher *Cyclopedia of the Law of Private Corporations,* § 41 (rev. perm. ed. 1974) (collecting cases). Federal courts have applied the doctrine in federal question litigation in a variety of settings. Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law,* 95 Harv. L. Rev. 853, 856 *et seq.* (1982).

Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983), is illustrative. That case was a § 301 suit asserting that conduct of a nonunion double-breasted employer—i.e., a nonunion employer created by a unionized employer bound by a collective bargaining agreement—violated the agreement. The district court held that, since the nonunion firm was a separate entity from the union firm, a court could not hold the nonunion firm bound by the union firm's labor agreement. The Fifth Circuit reversed, holding that notwithstanding the distinction in corporate identity between the union and nonunion firms, the collective agreement could be held binding on both. That court observed that the single employer and alter ego theories, developed by the NLRB, are both "clearly designed to promote the faithful performance of a collective bargaining agreement not only by the signatory employer *but also by a nonsignatory employer with the requisite high degree of consanguinity to the signatory employer.*" *Id.* at 511 (emphasis added). The Fifth Circuit declared:

> [I]n view of the common goals of the LMRA and the NLRA and the existence of a substantial body of case law developed by the agency possessing special expertise in the area, *there is every reason why the substantive law should be the same.*

Id. (Emphasis added).

The conflict between *Pratt-Farnsworth* and this case could not be more clear. Whereas the Fifth Circuit found the NLRB doctrines to state appropriate tests in § 301 litigation for determining whether two purportedly discrete entities are truly one, the Fourth Circuit found those doctrines inapplicable. (9a). The Fifth Circuit remanded *Pratt-Farnsworth* to the district court for determination whether the union and nonunion firms should be regarded as a single entity. Had the Fifth Circuit applied the test adopted in the instant case by

the Fourth Circuit, the *Pratt-Farnsworth* suit would have been dismissed for lack of evidence of "authorization" by the nonunion firm.[11]

The decision below is equally inconsistent with decisions of at least five other circuits. In *Crest Tankers, Inc. v. National Maritime Union of America*, 796 F.2d 234 (8th Cir. 1986), the Eighth Circuit embraced both the single employer and alter ego doctrines as bases for finding a nonsignatory "so closely tied to a signatory employer as to bind them both to the agreement." *Id.* at 237. In that case, two nonsignatory employers sued to enjoin the arbitration of a union's claim that its collective bargaining agreement applied to operations of the signatory employer's corporate affiliates.[12] *Crest*

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[11] Unlike the instant case—in which no issue of representation exists—the unions in *Pratt-Farnsworth* sought to extend their status as bargaining representative to a group of hitherto unrepresented employees. In such a circumstance, acceptance of the union's assertion that the union and nonunion firms should be treated as one, posed an issue of representation. In the Fifth Circuit's view, a court is authorized to decide the appropriateness of a combined bargaining unit in the context of a § 301 suit where necessary to resolution of an underlying contract breach issue. 690 F.2d at 517. The Ninth Circuit has held to the contrary. *Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc.*, 693 F.2d 81 (9th Cir. 1982), *cert. denied*, —— U.S. ——, 105 S.Ct. 263 (1984) (White, J. and O'Connor, J., dissenting). In this case, no issue of representation exists inasmuch as Article IA(f) makes NBCWA applicable only to UMWA-represented operations and the UMWA is already the established representative of the employees of all of the Massey mining companies involved in this case. As stated in *Pratt-Farnsworth*, 690 F.2d at 524, a bargaining unit determination is "totally unnecessary" where no dispute over representation exists.

[12] The contract clause in *Crest Tankers* purported to extend application of the labor agreement to the signatory's affiliates regardless whether the union was the established representative of the affiliates' employees. As explained above, NBCWA Article IA(f) does not do so. Apart from that distinction—which obviously militates in favor of the UMWA—the question of the nonsignatory's duty to arbitrate arises in virtually identical contexts in the two cases.

Tankers echoes *Pratt-Farnsworth* in applying the NLRB tests to a nonsignatory's duty to arbitrate and is in equally clear conflict with the Fourth Circuit's decision.

The Fourth Circuit's authorization test is similarly in conflict with *Service Employees Union, Local 47 v. Commercial Property Services, Inc.*, 755 F.2d 499, 504 (6th Cir. 1985). There, in another case of asserted double-breasting, the union sought to compel arbitration of its claim that a nonunion janitorial firm was covered by the union's collective bargaining agreement with an affiliated union firm. The Sixth Circuit held that the nonunion firm would be required to arbitrate, although not signatory to the labor agreement, (1) if the nonunion firm and the signatory were determined to "constitute a single employer"; (2) if the two firms were found to be "alter egos"; or, (3) if the "situation is [otherwise] appropriate for piercing the corporate veil." 755 F.2d at 504.

In *American Bell Inc. v. Federation of Tel. Workers*, 736 F.2d 879 (3rd Cir. 1984), the union, in the wake of the AT&T corporate reorganization, brought suit against a transferee of the assets of one of AT&T's local operating subsidiaries to compel arbitration of its claim that the transferee was bound by the union's agreement with the asset transferor. The Third Circuit subscribed to the same three-part formulation of the test for disregarding the corporate form stated in *Service Employees. American Bell, Inc., supra*, 736 F.2d at 886, 889.

The Ninth Circuit in *Gateway Structures, Inc. v. Carpenters 46 Northern Calif. Counties Conference Bd.*, 779 F.2d 485 (9th Cir. 1985), also upheld application of the NLRB single employer and alter ego doctrines to determine a nonsignatory's duty to arbitrate. At issue was whether an arbitration award had properly held that a nonunion construction firm was bound by a labor agreement signed by its unionized affiliate and further that

the nonunion firm had breached the agreement by using nonunion labor. The Ninth Circuit enforced the arbitration award holding that the union's effort to apply the labor agreement to the nonsignatory could prevail under either NLRB doctrine.[13]

The Seventh Circuit in *General Drivers, Local Union 89 v. Public Serv. Co. of Indiana, Inc.*, 705 F.2d 238, 242 (7th Cir. 1983), also applied the single employer test in determining a nonsignatory's duty to arbitrate albeit concluding that no single employer relation had been shown in the particular case. In that case, a union which represented employees of a signatory construction contractor sought to compel arbitration of its claim that the owner of the construction project, a nonsignatory, was bound by the union's agreement along with the contractor.

3. The conflict among the circuits is at the heart of national labor policy and needs to be resolved promptly. This Court has observed that the "subject matter of § 301 (a) 'is peculiarly one that calls for uniform law.'" *Local 174, Teamsters of America v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). Many labor agreements, as here, are nationwide in scope and span several federal judicial circuits. The practical implications of a lack of uniformity are patent. So long as the present conflict exists, the outcome in cases such as this will likely depend on the jurisdiction in which one party or the other first files suit. Indeed, as we explain in the margin, the circuit

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[13] The Ninth Circuit recited that a single employer determination gave rise to a representational issue since the employees of the nonsignatory firm had not previously been represented by the union. See n.11, *supra*. Noting its view in *California Consolidators, supra*, that a § 301 court cannot resolve the representational issue, it held the issue nevertheless could be properly resolved by the arbitrator. *Gateway Structures, supra*, 779 F.2d at 489-490. Here, as noted above, no representational issue exists inasmuch as the UMWA is already the established representative of the mines of all of the Massey nonsignatories.

conflict has already produced a conflict of results with respect to the *very parties* to the instant litigation.[14]

Moreover, the decision below undermines the national labor policy. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957), this Court instructed that the substantive law under § 301 is federal law "which the court must fashion from the policy of our national labor laws." The Court reaffirmed that lesson in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551 (1964), holding that the determination of when a nonsignatory successor has the requisite relationship to the signatory to justify an order compelling the nonsignatory to arbitrate must itself be determined "in the context of a national labor policy." Noting the "impressive policy considerations favoring arbitration," the Court concluded that those considerations were "not wholly overborne by the fact that Wiley did not sign the contract being construed." *Id.* at 550.

In adopting its restrictive "actual authorization" test, the Fourth Circuit ignored the "impressive policy con-

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[14] Of the Massey nonsignatory entities before the Court in this case, thirteen operate mines located in West Virginia in the Fourth Circuit while six other mine locations are in Kentucky in the Sixth Circuit. In separate § 301 litigation, the union brought suit to compel arbitration of a dispute which arose under the NBCWA of 1981 at the Blue Springs mine in Kentucky against Respondents Blue Springs, A.T. Massey, and Rawl Sales/Blackberry Creek. *International Union, UMWA v. Blue Springs Coal Co., et al.*, C.A. No. 85-154 (E.D. Ky.). A.T. Massey requested dismissal on the ground that, as a nonsignatory to the 1981 NBCWA, it had no duty to arbitrate. U.S. Magistrate Joseph M. Hood, noting the conflict between the Fourth Circuit's decision in the instant case and the governing decision of the Sixth Circuit in *Service Employees*, held that Massey would be required to arbitrate disputes under the 1981 NBCWA if determined to be a single employer with Defendants Blue Springs, *et al.* which were signatory to that Agreement (Magistrate's Report and Recommendation of January 6, 1987).

siderations favoring arbitration." [15] Moreover, by refusing to apply the NLRB's single employer doctrine, that Court ignored this Court's central injunction to fashion § 301 law "from the policy of our national labor laws." For that reason as well, the conflict between the Fourth Circuit's position and the positions of the other federal courts of appeals amply warrants resolution by this Court.[16]

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[15] The "authorization test" invites an employer to avoid arbitration by interposing a nonsignatory entity which naturally refrains from authorizing the signatory to bind it to arbitrate. In the related context of commercial arbitration, where enforcement of agreements to arbitrate is also favored as a matter of federal policy, *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), it has been consistently held that nonsignatories must arbitrate where circumstances warrant piercing the corporate veil. *Fisser v. International Bank*, 282 F.2d 231, 234 (2d Cir. 1960); *Interocean Shipping Co. v. National Shipping & Trading Corp.*, 523 F.2d 527, 539 (2d Cir. 1975); *In re Oil Spill by Amoco Cadiz*, 659 F.2d 789, 796 (7th Cir. 1981). The Second Circuit in *Fisser*, *supra*, 282 F.2d at 234, refusing to make the duty to arbitrate commercial disputes turn on authorization, observed that the nonsignatory obviously will not manifest "consent" to an agreement to arbitrate but rather "carefully avoids any such agreement express or implied in fact." A test turning upon authorization effectively stacks the deck against arbitration claims *regardless how transparent the distinction in corporate identity.* It inappropriately allows federal labor policy "to be defeated by the fragmentation of an integrated business into a congeric of corporate entities . . . ." *Bowater Steamship Co. v. Patterson*, 303 F.2d 369, 373 (2d Cir. 1962) (application of Norris LaGuardia Act); *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 404 (1960), *rev'g*, 261 F.2d 503 (6th Cir. 1958) (court of appeals erred in refusing to allow NLRB to present single enterprise claim and pursue discovery against affiliated corporations in contempt proceedings against employer for evasion of prior order requiring it to remedy unfair labor practices). The standard adopted by the Fourth Circuit in this case is anomalous in allowing use of the corporate form to evade labor law obligations in the single context of § 301 litigation.

[16] This Petition presents a second question: whether the Court of Appeals' decision, contrary to decisions of this Court, denied the

union's right to present evidence and pursue discovery addressed to the newly-adopted legal test.

The Court of Appeals' final resolution of the arbitration claim without a remand was clearly incorrect in that the appeal was from a preliminary injunction entered upon a truncated record and without discovery. This Court has underscored that a "party . . . is not required to prove his case in full at the preliminary injunction hearing" and declared it "generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits. . . ." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). The Fourth Circuit's decision amounts to a grant of summary judgment on behalf of a party which never filed a motion therefor and against a party which was never afforded discovery or notice of the motion, or even the chance to respond.

Moreover, this Court ruled in *Pullman-Standard, A Div. of Pullman, Inc. v. Swint*, 456 U.S. 273, 292 (1982):

> [W]here findings are infirm because of an erroneous view of the law, *a remand is the proper course unless the record permits only one resolution of the factual issue.*

(Emphasis added). The panel majority mentioned, but did not rely upon, a supposed concession of union counsel at oral argument that the record was complete (9a). Whatever the proper understanding of counsel's remark at the time—the union submitted a post-argument memorandum making clear that counsel had characterized the record as adequate *only for review of the preliminary injunction* (see Judge Hall's dissent (10a))—union counsel *surely did not concede that the existing record was adequate for application of a test which first surfaced thereafter in the Court of Appeals' decision.* That the existing record contains "no evidence" that the Massey nonsignatories authorized Omar to bind them is hardly a justification for failing to remand the case when all parties had believed a different test to govern and the union has not even had the opportunity to pursue discovery framed in light of the standard adopted.

In the context of § 301 litigation involving the precise question of a nonsignatory's duty to arbitrate, other courts, after clarifying the applicable law, *have universally remanded the case for further development in accordance with the law so clarified. Pratt-Farnsworth, supra*, 690 F.2d at 525, 537; *Service Employees, supra*, 755 F.2d at 504; *American Bell, supra*, 736 F.2d at 887, 889; *Crest Tankers, supra*, 796 F.2d at 239. These decisions, all proper applications of the rule of *Swint*, conflict with the denial of remand here.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted and the judgment of the Court of Appeals reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2518 (L)

A. T. MASSEY COAL COMPANY, INC.; WYOMAC COAL COMPANY, INC.; PIKE COUNTY COAL CORPORATION; RAWL SALES and PROCESSING CO./BLACKBERRY CREEK COAL COMPANY; WINSTON COAL COMPANY; ROBINSON-PHILLIPS COAL COMPANY; SIMRON FUEL COMPANY, INC.; SHANNON-POCAHONTAS COAL CORPORATION; ROYALTY SMOKELESS COAL COMPANY/TRACE FORK COAL COMPANY; BIG BEAR MINING COMPANY; JOBONER COAL COMPANY; T.C.H. COAL COMPANY; BIG BOTTOM COAL COMPANY, INC.; SPROUSE CREEK PROCESSING COMPANY; TALL TIMBER COAL COMPANY; PIKCO MINING COMPANY; ROCKY HOLLOW COAL CO.; M & B COAL COMPANY; DEHUE COAL CORPORATION; BLUE SPRINGS COAL COMPANY; ALLBURN COAL COMPANY; POND CREEK COAL COMPANY; P. M. CHARLES COAL CO.,
Appellants,

versus

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA,
Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
D. Dortch Warriner, District Judge. (CA 85-948)

No. 86-3826

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; UNITED MINE WORKERS OF AMERICA, LOCAL UNION No. 1525,

Appellees,

versus

A. T. MASSEY COAL COMPANY, INC.; RAWL SALES AND PROCESSING COMPANY/BLACKBERRY CREEK COAL COMPANY; SPROUSE CREEK PROCESSING COMPANY; TALL TIMBER COAL COMPANY; PIKCO MINING COMPANY; ROCKY HOLLOW COAL COMPANY; BLUE SPRINGS COAL COMPANY; ALLBURN COAL COMPANY, INC.; POND CREEK MINING COMPANY; P.M. CHARLES COAL COMPANY; WYOMAC COAL COMPANY, INC.; WINSTON COAL COMPANY; ROBINSON-PHILLIPS COAL COMPANY; M. & B. COAL COMPANY; SIMRON FUEL INC.; SHANNON-POCAHONTAS COAL COMPANY; ROYALTY FORK COAL COMPANY; BIG BEAR MINING COMPNY; PIKE COUNTY COAL CORPORATION; JOBONOR COAL COMPANY; T.C.H. COAL COMPANY; BIG BOTTOM COAL COMPANY, INC.; OMAR MINING COMPANY; and DEHUE COAL CORPORATION,

Appellants.

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston
Dennis R. Knapp, Senior District Judge. (C/A 86-0014)

Argued: May 5, 1986 Decided: September 3, 1986

Before WIDENER, HALL, and MURNAGHAN, Circuit Judges.

MURNAGHAN, Circuit Judge:

A.T. Massey Coal Company and a number of other corporations affiliated with Massey have appealed a grant at the behest of International Union, United Mineworkers of America, et al., of an injunction by the United States District Court for the Southern District of West Virginia, directing Massey and its affiliates to arbitrate pursuant to the terms of an expired National Bituminous Coal Wage Agreement ("NBCWA"). The order was entered following a decision by the United States District Court for the Eastern District of Virginia in a related proceeding initiated by Massey and its affiliates that it lacked subject matter jurisdiction to consider the substantive issue. The two cases have been consolidated for appeal purposes.

Functioning as a single production entity with sales, transportation and distribution coordinated from Massey's Richmond headquarters, Massey and its affiliated companies have at times allowed the Bituminous Coal Operators Association ("BCOA") to represent them in collective bargaining. With respect to the 1981 NBCWA, some of the Massey companies thereby became bound. Other operating companies signed the agreement individually. The 1981 NBCWA was terminated by the union, the United Mine Workers of America ("UMWA"), effective September 30, 1984. Prior to that date, all of the Massey companies, with the single exception of Omar Mining Company, had withdrawn from the BCOA. All those who had withdrawn rejected a union request that they become signatories to the as yet unnegotiated successor contract to the 1981 NBCWA.

A 1984 NBCWA was negotiated and became effective October 1, 1984. The absence of an agreement covering

companies not in the BCOA, *i.e.*, all Massey's affiliated companies, excepting Omar, led the union promptly to strike as to them on October 1, 1984.

On November 1, 1984, the union filed an unfair labor practice charge against Massey and its affiliated companies on the grounds that, as a common, or single, employer, they were all bound by Omar's acceptance of the 1984 NBCWA negotiated by the BCOA. The unfair labor charge asserts that it is wrong for each of the companies which had withdrawn from the BCOA prior to October 1, 1984 to attempt to bargain separately for a new contract. Another unfair labor practice charge has been filed claiming "surface bargaining with a view to avoiding an agreement" in violation of the National Labor Relations Act ("NLRA" or "the Act"). The charge is still pending.[1]

The single employer charges which had been filed were disposed of by a December 20, 1985 agreement providing that "A.T. Massey Coal Company, Inc. will sign any collective bargaining contract[s] negotiated which embodied terms and conditions of employment to which it agreed." The agreement further provided:

> Further, it is understood and agreed that if the charged parties and charging party agree during negotiations that any contract[s] negotiated and embodying agreed upon terms and conditions of employment shall be signed only by the operating companies set forth in Attachment B, in that event, A.T.

---

[1] The "single employer" doctrine derives from the NLRA's definition of "employer" and allows the National Labor Relations Board ("NLRB") to treat associated or affiliated employeres as a single entity, or "single employer" for various purposes under the Act, such as the Act's secondary boycott provisions, or to impose a duty to bargain collectively with employees of a closely affiliated employer. *See* 2 C. Morris, ed. *The Developing Labor Law* 1440-42 (2d ed. 1983).

Massey Coal Company, Inc. will not be obligated to sign the contract[s].

Through that agreement the strike was terminated with the union agreeing that its members should return to work. However, the UMWA then asserted that despite the fact that the agreement covered only future contracts with the union the individual employers had been bound all along by the 1984 NBCWA, although they had withdrawn from the BCOA, because of their relationship to Omar and, in turn, Omar's linkage with the BCOA. On that theory, the UMWA has sought to hold Massey and each subsidiary or affiliate to the 1984 NBCWA terms. The question of whether the negotiation conducted on Omar's behalf bound Massey and its affiliates to the 1984 NBCWA has obviously loomed large in the minds of the parties in the present consolidated actions. Massey's attempt to obtain declaratory relief in an action initiated on December 2, 1985 in the United States District Court for the Eastern District of Virginia foundered on the ruling of the district court that it lacked subject matter jurisdiction.[2] That ruling is on appeal and is one of the consolidated cases to be resolved by us. Contemporaneously, Massey also filed a complaint with the National Labor Relations Board.

On January 2, 1986, the other case productive of an appeal in the consolidated proceeding before us was filed in the Southern District of West Virginia. The union there sought a declaratory judgment that the 1984 NBCWA was binding on the Massey companies, as well as a preliminary injunction requiring that the companies be deemed to have joined in a grievance the UMWA had filed against Omar on the basis that all Massey companies were bound by the 1984 NBCWA.

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[2] The rationale employed was that § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, which affords jurisdiction for suits "for violation of [collective bargaining agreements]", affords no jurisdiction in an action for a declaration that there is no such collective bargaining agreement in effect.

The district court, following extensive introduction of evidence, made findings that:

1) The several employers involved were wholly-owned subsidiaries of Massey;

2) The 1984 NBCWA language making operation of all coal lands and preparation facilities owned or held under lease by any party, or by any subsidiary or affiliate subject to the terms thereof, on the basis of Omar's clearly being a party, rendered all the other Massey companies parties as well;

3) The arbitration provision of the 1984 NBCWA, therefore, applied to each of the Massey companies;

4) Massey had refused to arbitrate grievances submitted under the 1984 NBCWA;

5) Massey supervises day to day matters of its subsidiaries and dictates union negotiating procedures, though it and the subsidiaries portray themselves as negotiating individually; and

6) The union and associated plaintiffs have suffered or will suffer irreparable injury because of the defendants' refusal to arbitrate.

On the basis of those findings, the district judge concluded that the arbitration proceedings clearly bound Omar and that "whether or not the defendant companies are 'subsidiaries or affiliates' of Omar within the meaning of Article I(A)(f)[3] . . . is a matter which can only be determined under the grievance and arbitration procedure of the 1984 [NBCWA]." The court further concluded that the single employer status applicable to Mas-

[3] Article I(A)(f) of the NBCWA specifies in part that "As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, *or by any subsidiary or affiliate at the date of this Agreement. . . .*" (Emphasis provided).

sey and Omar made it appropriate to require Massey to arbitrate the grievance according to the 1984 NBCWA. The court also applied the criteria in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977) and determined it was appropriate to issue the preliminary injunction, whose validity now is before us on appeal.

As a preliminary matter we address Massey's appeal from the order entered by the United States District Court for the Eastern District of Virginia that it lacked subject matter jurisdiction under § 301 of the LMRA to issue a declaratory judgment to the effect that Massey and its affiliated companies (excepting Omar) were not party to the NBCWA of 1984 and the December 23, 1985 collective bargaining agreement. The district court relied on the plain language of § 301 which states that "[s]uits *for violation of contracts* between an employer and a labor organization representing employees in an undertaking affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties. . . ." 29 U.S.C. § 185 (emphasis provided).

The district court, relying as well on the only cases which have considered the precise issue of whether there is jurisdiction under § 301 as to the threshold question of whether there was a valid contract or collective bargaining agreement which would give the district court jurisdiction, ruled that the Act affords no such jurisdiction in the case of a declaratory judgment brought to show that there was *no* contract to which the companies were bound. *See NKD Corp. v. Local 1550 of United Food & Commercial Workers Intl. Union,* 709 F.2d 491, 493 (7th Cir. 1983); *Hernandez v. National Packing Co.*, 455 F.2d 1252, 1253 (1st Cir. 1972); *John S. Griffith Construction Co. v. Southern California Cement Masons,* 607 F.Supp. 809, 812 (C.D. Cal. 1984).

We agree with the district court and hold that a plaintiff must allege breach of an existing collective bargain-

ing contract in order to avail itself of jurisdiction under § 301 of the Act. Since Massey sought a declaration that it was *not* bound by the 1984 NBCWA or the December 23, 1985 collective bargaining agreement, it did not bring itself under the explicit jurisdictional language of the Act. The later suit brought by the union in the West Virginia district court has no such jurisdictional infirmity since it seeks a declaration that Massey and its affiliated companies were bound by the 1984 NBCWA, an admittedly existing agreement. We proceed to consider the appeal of Massey from the order granted by that court requiring it and its affiliated companies to submit to arbitration under the 1984 NBCWA.

The disposition by the West Virginia district court seems to us to have omitted one significant and, to some extent at least, dispositive issue. In *AT&T Technologies, Inc. v. Communications Workers of America, et al.*, 54 U.S.L.W. 4339 (U.S. April 7, 1986), the Supreme Court, relying on *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), emphasized that an obligation to arbitrate is a matter of contract and the existence of such a contract must be established before an arbitration can occur. The Court went on to say that whether there is a contract to arbitrate "is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." In deferring to the arbitrator, the West Virginia district court overlooked the necessity of deciding the judicial question of whether agreement to arbitrate had, in fact, taken place. The grant of the preliminary injunction is, therefore, vacated.

The question then arises whether the case should be remanded for a determination of the question or whether, in the peculiar circumstances of the case as it has appeared before us, the question is purely one of law which

it is appropriate for us to address and decide. *Scarborough v. Ridgeway*, 726 F.2d 132, 135 (4th Cir. 1984); *MacMullen v. South Carolina Electric & Gas Co.*, 312 F.2d 662, 670 (4th Cir. 1963), *cert. denied*, 373 U.S. 912 (1963). At oral argument, counsel for Massey argued that the question presented no disputed issue of fact and was ripe for resolution in the court of appeals. The union through its counsel agreed.[4]

Proceeding on that basis, we are satisfied that an agreement to arbitrate on behalf of Massey has not been established. The union seeks to rely on the "single employer" doctrine developed under the NLRA. The determination that Massey is the parent company and that it and its subsidiaries are a "single employer" does not settle the issue of whether Massey and its subsidiaries, other than Omar, have agreed to arbitrate. Indeed, it is inconsistent to conclude that all the subsidiaries of Massey are merely puppets, for it then would be strange for one of them to remain in the BOCA while all the others opted out. Ordinary agency principles rather than a doctrine developed by the NLRB for other, if related, purposes control the question of whether Omar was empowered to act as an agent authorized to bind its parent and affiliates to an agreement to arbitrate. Our review of the record discloses no evidence to support a conclusion that Omar had so bound the others. Accordingly, we rule that there is no obligation on the part of Massey and its affiliates, other than Omar, to negotiate as a consequence of the provisions of the 1984 NBCWA.

AFFIRMED IN PART;
REVERSED IN PART.

[4] Assailed with second thoughts, the union has, post-argument, communicated with the court its desire to have the matter remanded for a determination by the district court. However, our review of the record satisfies us that there is no issue of disputed fact presented. By proceeding to decide the question, we will avoid delay with respect to a matter which obviously is apt to reappear at a later date.

HALL, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's conclusion that the district court lacked jurisdiction in the Virginia case. With respect to the West Virginia case, I also concur in the majority's opinion insofar as it holds that the district court—not the arbitrator—must determine whether Massey and the union are bound by the 1984 NBCWA contract due to the signature of Omar, one of Massey's subsidiaries. Finally, I concur in the majority's decision to vacate the preliminary injunction.

I cannot agree, however, with the majority's determination to reach the ultimate issue and to hold that an agreement to arbitrate on behalf of Massey has not been established. In my view, the majority, in deciding this question, has usurped a function which rightfully belongs to the district court in the first instance. Clearly, the district court is in the best position to resolve this question not only because of its role as fact finder, but also because the case proceeded below on a request for a preliminary injunction and the district court may find it necessary to admit additional evidence before reaching a final decision on the merits.[1]

Because the district court has not yet had an opportunity to address the question of whether Massey is bound by the contract, I would remand this case to the district court for further proceedings to decide this issue.

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[1] Despite the union's representation at oral argument that the record was complete, the union clearly stated in its post-argument memorandum that it had made that representation concerning the preliminary injunction phase only. Moreover, the union pointed out that on the merits it would offer the following pertinent evidence on remand: (1) evidence as to the 1984 bargaining involving Omar and the Bituminous Coal Operators' Association (BCOA), (2) the bargaining history of 1A(f), (3) additional background to arbitration authorities applying and interpreting 1A(f), and (4) other evidence it could gather prior to trial on the interrelationship of the Massey subsidiaries, in particular the interrelationship of Omar and A. T. Massey.

JUDGMENT
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86-3826

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; UNITED MINE WORKERS OF AMERICA, LOCAL UNION NO. 1525, *Appellees,*

versus

A. T. MASSEY COAL COMPANY, INC.; RAWL SALES AND PROCESSING COMPANY/BLACKBERRY CREEK COAL COMPANY; SPROUSE CREEK PROCESSING COMPANY; TALL TIMBER COAL COMPANY; PIKCO MINING COMPANY; ROCKY HOLLOW COAL COMPANY; BLUE SPRINGS COAL COMPANY; ALLBURN COAL COMPANY, INC.; POND CREEK MINING COMPANY; P.H. CHARLES COAL COMPANY; WYOMAC COAL COMPANY, INC.; WINSTON COAL COMPANY; ROBINSON-PHILLIPS COAL COMPANY; M. & B. COAL COMPANY; SIMRON FUEL INC.; SHANNON-POCAHONTAS COAL COMPANY; ROYALTY FORK COAL COMPANY; BIG BEAR MINING COMPANY; PIKE COUNTY COAL CORPORATION; JOBONER COAL COMPANY; TCH COAL COMPANY; BIG BOTTOM COAL COMPANY, INC.; OMAR MINING COMPANY; AND DEHUE COAL CORPORATION, *Appellants.*

[Filed Sept. 3, 1986]

Appeal from the United States District Court for the Southern District of West Virginia

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3826

INTERNATIONAL UNION, *et al.*,
Appellees,
versus
A. T. MASSEY COAL COMPANY, INC., *et al.*,
Appellants.

[Filed Dec. 3, 1986]

On Petition for Rehearing and Suggestion
for Rehearing In Banc

ORDER

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

On the question of rehearing before the panel, Judge Hall voted to rehear the case. Judges Widener and Murnaghan voted to deny.

As no member of the Court requested a poll on the suggestion for rehearing in banc, IT IS ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

IT IS FURTHER ORDERED that leave to file a reply to appellants' answer to the petition for rehearing is denied.

Entered at the direction of Judge Murnaghan.

For the Court,

JOHN M. GREACEN
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

Civil Action No. 2:86-0014

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; UNITED MINE WORKERS OF AMERICA LOCAL UNION 1525,

Plaintiffs,

vs.

A. T. MASSEY COAL COMPANY, INC., *et als.,*

Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION

In accordance with this Court's Memorandum Opinion on Preliminary Injunction of even date herewith, it is ADJUDGED, ORDERED and DECREED:

1. That the defendants be enjoined from refusing to process the "Omar grievance" relating to or concerning the alleged application of the 1984 National Bituminous Coal Wage Agreement to Masesy affiliates and to arbitrate it if requested to do so. Pending arbitration of the "Omar grievance," the defendants are preliminarily enjoined and required to maintain the status quo ante litem to abide by the following provisions of the 1981 National Bituminous Coal Wage Agreement:

(i) The grievance and arbitration procedures embodied Article XXIII and XXIV as to grievances including without limitation, safety matters and any discharges, which arose on or after the return to work of December, 1985 or January, 1986 at certain of the defendants' operations. However, arbitrations shall not be selected under the procedures of Article XXIII (b), but shall be selected by agreement of the

parties, or if the parties are not able to agree, by the procedure of the Federal Mediation and Conciliation Service;

(ii) The provisions of Article XX pertaining to retiree health insurance summarized in Item 10 (c) of the "General Description of the Health and Retirement Benefits."

2. That this order shall not become effective until the plaintiffs post and file a bond herein in the sum of Ten Thousand Dollars ($10,000.00), plus the cost of the provisions of health benefits as set forth in paragraph 1 (ii), based upon a monthly report of said cost filed with this Court. The plaintiffs will be required to increase their bond each month in accordance with a determination of these costs. This bond, with surety, is conditioned for such costs and damages incurred or suffered by any party who is found to have been here wrongfully restrained or enjoined, said bond and surety to be approved by this Court or the Clerk thereof.

3. That this preliminary injunction and bond filed thereunder shall be effective only during the term of the National Bituminous Coal Wage Agreement of 1984, or any extension thereof.

4. That this Court shall retain jurisdiction of this case to insure compliance and resolve any other related issues.

The Clerk is directed to mail certified copies of this order, together with a copy of the Memorandum Opinion, to counsel of record herein.

DATED: February 25, 1986

/s/ Dennis R. Knapp
DENNIS R. KNAPP
Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

Civil Action No. 2:86-0014

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; UNITED MINE WORKERS OF AMERICA LOCAL UNION 1525,

Plaintiffs,

vs.

A. T. MASSEY COAL COMPANY, INC., *et als.*,
Defendants.

MEMORANDUM OPINION ON
PRELIMINARY INJUNCTION

On January 28, 1985, came the plaintiffs by James M. Haviland, Grant Crandall, and Crandall, Pyles & Crandall, their attorneys, and came also the defendants, A. T. Massey Coal Company, Inc. (Massey), by Gregory B. Robertson and Hunton & Williams, its attorneys, and Omar Mining Company (Omar) by Forrest H. Roles and Smith, Heenan & Althen, its attorneys, for hearing upon the motion of plaintiffs for a preliminary injunction.

Upon consideration of all the evidence presented, and the briefs and argument of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, International Union, United Mine Workers of America (UMWA), is an unincorporated associa-

tion and labor organization within the meaning of Section 2(5) of the National Labor Relations Act, 29 U.S.C. Section 152(5), having its principal office at 900 Fifteenth Street, N.W., Washington, D.C. 20005. As relevant to this action, the UMWA is the exclusive bargaining representative for coal miners who work, or who have worked, at defendants' mines in this judicial district, including the operations of Omar located in Boone County, West Virginia. The UMWA represents the above-described employees with regard to wages, hours and conditions of employment.

2. Plaintiff, District 17, United Mine Workers of America is an unincorporated association and labor organization within the meaning of the same § 2(5), having its principal office at 1300 Kanawha Boulevard, East, Charleston, Kanawha County, West Virginia. The majority of the mining operations conducted by the defendants are located within the jurisdiction of this court.

3. Plaintiff, Local Union 1525, UMWA, is a labor organization as defined by § 2(5) of the Act, 29 U.S.C. 152(5), and represents for collective bargaining purposes employees of Omar.

4. Defendant, Massey, with principal offices at 4 North Fourth Street in Richmond, Virginia, is a corporation organized and existing under the laws of the State of Virginia, and operating actively in West Virginia through, inter alia, Rawl Sales and Processing Company, Blackberry Creek Coal Company, and Wyomac Coal Company, Inc. Massey wholly owns approximately 73 subsidiary corporations and is engaged in the business of producing, purchasing and selling coal profitably to large domestic and foreign consumers. To that end, Massey, itself and through its subsidiaries, many of whom are the defendants herein, purchases and holds properties; develops long-term markets on a favorable climate for spot sales; develops mines; produces coal; purchases coal produced by others; and sells or brokers the coal so produced.

5. The remaining defendant coal companies named herein are wholly owned subsidiaries of Massey: Rawl Sales and Processing Company, Blackberry Creek Coal Company, Sprouse Creek Processing Company, Tall Timber Coal Company, Pikco Mining Company, Rocky Hollow Coal Company, Bluesprings Coal Company, Allburn Coal Company, Inc., Pond Creek Mining Company, P. M. Charles Coal Company, Wyomac Coal Company, Inc., Winston Coal Company, Robinson-Phillips Coal Company, M & B Coal Company, Simron Fuel, Inc., Shannon-Pocahontas Coal Company, Royalty Smokeless Coal Company, Trace Fork Coal Company, Big Bear Mining Company, Pike County Coal Corporation, Joboner Coal Company, TCH Coal Company, Big Bottom Coal Company, Inc., Dehue Coal Corporation, and Omar Mining Company. All the defendants are employers as defined by § 2(2) of the Act, 29 U.S.C. 152(2).

6. Most of the subsidiaries employ coal miners represented by the UMWA and were struck from about October 1, 1984 through December 22, 1985, Omar excepted.

7. The International Union entered into the National Bituminous Coal Wage Agreement of 1984 (1984 Agreement) with the Bituminous Coal Operators Association (BCOA), of which Omar is a member.

8. Omar is an employer engaged in the production of coal in an industry affecting commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the National Labor Relations Act, 29 U.S.C. Sections 152(2), (6) and (7). This matter arose in this judicial district, where duly authorized officers or agents of the UMWA are engaged in representing the membership; where the agreement signed on behalf of Omar was to be performed; where defendants have maintained substantial and consistent contacts personally or through their officers, agents, or employees; and where the principal and foreseeable consequences of defendants' actions occurred. 28 U.S.C. Section 1391; 29 U.S.C. 185. The 1984 Agreement will be performed in part in the State of West Virginia.

9. By virtue of its membership in the BCOA, Omar is a party to the 1984 Agreement.

10. Article IA(f) of the Ageement provides:

> *Application of this Contract to the Employer's Coal Lands*
>
> As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by *any subsidiary or affiliate* at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. This section will immediately apply to any new operations upon the Union's recognition, certification, or otherwise properly obtaining bargaining rights. Notwithstanding the foregoing, the terms of this Agreement shall be applied without evidence of Union representation of the Employees involved to any relocation of an operation already covered by the terms of this Agreement. (Emphasis added)

11. The 1984 Agreement also contains a grievance procedure, which provides that if the grievance is not resolved, the matter proceeds to final and binding arbitration.

12. On December 23, 1985, representatives of Local Union 1525 and District 17 tendered a grievance with management of Massey at Omar charging that defendant companies in addition to Omar were bound to the 1984 Agreement under Article IA(f), hereinafter referred to as the "Omar grievance." Management of Omar, acting on behalf of all defendants, including Massey, refused to accept or process the grievance with regard to Massey.

13. Although Omar accepted and is processing grievances growing out of its own operations, Massey refused to process a grievance on its behalf.

14. Massey and its subsidiaries involved in this litigation have interrelated operations, management, centralized control of labor relations, and common ownership and financial controls.

15. While the individuals who conduct the day-to-day management of the subsidiaries typically serve as president or in another officer position of the subsidiaries, the officers and senior staff of Massey serve also as officers of the coal producing subsidiaries. For example, Morgan Massey served as Chairman of the Board of Omar Mining Company for several years, having previously served as President of that company.

16. Massey selected, recommended and administered a program, known as the Value System designed to teach supervisors and managers how to get along with their employees.

17. Although many of the day-to-day details of the labor relations of the Massey subsidiaries and their hourly employees appear to be in the hands of the managers of the operating subsidiaries, Massey exercises control on a policy level of most of the critical aspects of the labor relations of the subsidiaries. The corporate records of all the subsidiaries are maintained at Massey headquarters in Richmond, Virginia.

18. Morgan Massey is the representative of Omar, and other Massey companies, on the Board of the BCOA. The BCOA is a multi-employer association of coal operators which negotiates labor agreements with the International Union. Under the 1981 National Bituminous Coal Wage Agreement, nine of the Massey subsidiaries listed under the heading of Omar Mining Company participated on a common basis in the BCOA. The BCOA bylaws require members to pool voting power of all related companies.

19. Under the 1984 Agreement Omar is again the lead company, along with another Massey subsidiary, LaBelle Processing Company.

20. Morgan Massey exercises a strong voice in the negotiation of the union contracts at Massey's unionized subsidiaries, whether they are BCOA signatories or "independent" signatories. Therefore, Massey as the parent company plays a critical and controlling role with regard to the terms and conditions of employment of the unionized employees of the Massey subsidiaries.

21. Although the unionized subsidiaries of Massey attempted to portray themselves in 1984-85 as independent entities by, among other means, scheduling and insisting on the conduct of individualized negotiations between most of them on an individual basis on the one hand, and the International Union on the other hand, it is clear that this strategy was dictated by Massey. Collective bargaining activities of all the Massey subsidiaries were conducted through the auspices of one law firm, counsel for Massey.

22. Based on all the foregoing, Massey plays a strong role in directing the labor policy of the operating subsidiaries. The fact that Massey, through its President, Morgan Massey, conducts relations with the unionized subsidiaries who deal with the UMWA through the BCOA is of itself enough to establish the necessary degree of centralized control of labor relations.

23. Although certain subsidiaries or financial personnel of the subsidiaries maintain that their finances are handled autonomously, it is clear that the accounting system in place at Omar and practically all of the other subsidiaries is dictated and established by Massey.

24. All plaintiffs have suffered irreparable injury on account of defendants' action in refusing to arbitrate. Plaintiffs have no adequate remedy at law for said immediate and irreparable injury. Any injury which may

result to the defendants from the issuance of a preliminary injunction is disproportionately minor as compared to the great, immediate and irreparable loss, injury and damage that will result to plainiffs if temporary and preliminary injunctions are not granted.

25. The probability of irreparable harm to the Union and its members far outweighs any likely harm to the defendants. Union pensioners and their families without health insurance are forced to forego medical treatment because of inability to pay for it. Certain Massey operations may be sold or leased without the protection of the successorship clause (Article IA(h)) of the NBCWA. Union members are denied access to neutral arbitration to resolve disputes, including a substantial number of discharges. The Union's ability to represent its members is substantially undermined. These injuries to the Union and its members, once suffered, are without remedy. Moreover, the potential for significant continuing labor strife remains. The harm to the defendants if ordered to arbitrate is essentially monetary and therefore subject to restitution. The public interest would be greatly served by the speedy resolution of this matter by the processes of arbitration.

26. Unless the Court issues an injunction to prevent it, the defendants will continue to refuse to process and to arbitrate the grievances.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action under Section 301 of the Labor Management Relations Act of 1974, as amended, 29 U.S.C. § 185, and the instant dispute is not within the exclusive jurisdiction of the National Labor Relations Board. See, *Carey v. Westinghouse Corp.*, 375 U.S. 261, 55 LRRM 2042 (1964). Further, jurisdiction lies within the general equity powers of this Court.

2. To determine whether companies constitute a single employer, the Court must consider:

(1) Interrelationship of operations,

(2) Common management,

(3) Centralized control of labor relations,

(4) Common ownership or financial control.

In the present case, the presence of all four criteria compels the conclusion that Massey and its subsidiaries involved in this litigation function as a single employer. While the presence of two or three of the above-listed elements would be a sufficient basis to establish single employer status, the presence of all four in this case make the conclusion that they are a common employer a compelling one. Therefore, plaintiffs have shown a probable right to bind Massey to the Omar contract as a single employer.

3. The National Bituminous Coal Wage Agreement of 1984 requires that disputes and differences between the plaintiff and the defendants be handled and settled through the grievance and arbitration procedures prescribed in said collective bargaining agreement. The dispute contained in the so-called "Omar grievance" should be resolved in accordance with said grievance and arbitration procedures.

4. Whether or not the defendant companies are all "subsidiaries or affiliates" of Omar within the meaning of Article IA(f), as charged in substance in the underlying grievances is a matter which can only be determined under the grievance and arbitration procedure of the 1984 Agreement. *Little Six Corp. v. United Mine Workers Local 8332*, 701 F.2d 26 (4th Cir. 1982). Since Massey and Omar constitute a single employer, the Court may order Massey to arbitrate the grievance in this matter.

5. For a preliminary injunction to be issued, four factors must first be considered by the Court: (1) Has the petitioner made a strong showing that it is likely to prevail upon the merits? (2) Has the petitioner shown that with-

out such relief it will suffer irreparable injury? (3) Would the issuance of the injunction substantially harm other interested parties? and (4) Wherein lies the public interest? See, *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977).

6. The Court concludes that a preliminary injunction should issue inasmuch as plaintiff has shown a reasonable likelihood of prevailing on the merits of this action and a substantial potential of incurring great, immediate and irreparable harm if such preliminary injunction is not issued, and any harm or loss which may be caused to the defendants by the issuance of such preliminary injunction is disproportionately minor compared to the great, immediate and irreparable harm and loss to plaintiffs if it is not issued. Furthermore, it is apparent that the public interest is best served by continued health care coverage of the pensioners and their families and the peaceful resolution of the matters involved herein.

/s/ Dennis R. Knapp
DENNIS R. KNAPP
Judge

DATED: February 25, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

Civil Action No. 2:86-0014

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; UNITED MINE WORKERS OF AMERICA LOCAL UNION 1525,

Plaintiffs,

vs.

A. T. MASSEY COAL COMPANY, INC., *et als.*,

Defendants.

ORDER MODIFYING ORDER GRANTING PRELIMINARY INJUNCTION

On Motion of Plaintiff's, the second sentence of paragraph one of the Order Modifying Order Granting Preliminary Injunction entered on February 25, 1986 is hereby modified to read:

> Pending arbitration of the "Omar grievance," the defendants, except A. T. Massey Coal Company, Inc., Rawl Sales and Processing Company/Blackberry Creek Coal Company, Wyomac Coal Company, Inc., and Pike County Coal Corporation, are preliminarily enjoined and required to maintain the status quo ante litem to abide by the following provisions of the 1981 National Bituminous Coal Wage Agreement.

The remainder of the order stands as stated in the Order.

/s/ Dennis R. Knapp
DENNIS R. KNAPP
Judge

DATED: February 26, 1986

STATUTES INVOLVED

Section 301 of the Labor-Management Relations Act, 61 Stat. 156, 29 U.S.C. 185:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.